No. 84855-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CHAD M. CARLSEN, and SHASTA L. CARLSEN, husband and wife, individually, and on behalf of a Class of similarly situated Washington families; and CARL POPHAM and MARY POPHAM, husband and wife, individually and on behalf of a Class of similarly situated Washington families,

Plaintiffs,

v.

GLOBAL CLIENT SOLUTIONS, LLC an Oklahoma limited liability company; ROCKY MONUTAIN BANK & TRUST, a Colorado financial institution; JOHN AND JANE DOES A-K,

Defendants.

GLOBAL CLIENT SOLUTIONS, LLC & ROCKY MOUNTAIN BANK & TRUST'S ANSWERING BRIEF

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I. PREFACE

On Certified Questions from the United States District Court for the Eastern District of Washington, the Carlsens and Pophams, the Plaintiffs in the District Court and the appellants here, ask this Court to do something extraordinary: determine that a statutory exemption does ***not*** apply as written to a bank and its processing agent, based on the conduct of others and a hue-and-cry against the entire debt settlement industry.

The Carlsen and Popham Opening Brief on Certified Questions ("Carlsen Brief") is deceptively simple and has some visceral appeal. But the superficial appeal of the arguments derives, in large part, from the fact that there is no analysis, just conclusions. Carlsen and Popham focus their interpretive arguments and angst on the debt settlement industry, not on what reason and the facts particular to the parties demonstrate.

Ultimately, to facilitate the simplicity, the Carlsen Brief is grounded in false premises, which are twisted to reach conclusions that are likewise false. The twisting is necessary in order to turn a banking relationship into something that suits the legal theory being advanced. The real questions here are straightforward: whether what defendants do is debt adjusting; whether they are exempt from the Debt Adjusting statute because each is doing business relating to banks; whether the statutory debt adjusting fee caps apply to defendants' establishment and

maintenance of bank accounts; and whether there is an implied common law cause of action against defendants for aiding and abetting, where the Debt Adjusting statute excludes such a civil claim and provides for an adequate civil remedy.

A. Nature of the case, an alleged "predatory fee."

The Carlsens and Pophams bring this putative class action against Rocky Mountain Bank and Trust ("RMBT"), and its account-processing agent, Global Client Solutions, Inc. ("GCS"), on behalf of all residents of the State of Washington who have established a bank account with RMBT administered by GCS.[1] The action alleges that RMBT and GCS are "debt adjusting" and that each is a "debt adjuster" "aiding and abetting" others, who are allegedly violating the Washington Debt Adjusting statute, RCW chapter 18.28 and Consumer Protection Act, RCW § 19.86 by charging "predatory" fees beyond the statutorily permitted percentage.[2] Carlsen and Popham make these allegations in the face of an express statutory exemption for banks and others engaged in business related to banks found in RCW § 18.28.010(2).

B. The reason behind the certified questions.

The U.S. District Court for the Eastern District of Washington stayed its determination of the motions to dismiss that RMBT and GCS

[1] [Ct. Rec. 83 at ¶¶ 1 & 2.]
[2] [Ct. Rec. 83 at ¶¶ 1, 35, 39 & 44.]

each filed, so that the parties could prepare proposed questions for certification to this Court.[3] In so doing, the District Court asked:

> Are GCS and RMBT engaged in "debt adjusting" as defined in RCW § 18.28.010(1), and if so, are they "debt adjusters" as defined in RCW § 18.28.010(2), or are they entities "doing business under and as permitted by any law of this state or of the United States relating to banks. . ."?[4]

As the District Court explained, because of "the dearth of legislative history and case law interpreting the Debt Adjusting statute," the certified questions focus on the application of the statutory exemption from the definition of a debt adjuster for those such as RMBT and GCS, who are doing business "relating to banks."[5]

II. FACTS PERTINENT TO CERTIFIED QUESTIONS

Much of the Carlsens' "Statement of Facts" consists of either an indictment of the debt settlement industry, *e.g.*, "Debt settlement programs are big business", or argumentative conclusions drawn from the Complaint, *e.g.*, "GCS operates as the central

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[3] [Ct. Rec. 40 at p. 8.]
[4] *Carlsen v. Global Client Solutions, LLC*, 2010 WL 786254 *4 (E.D. Wash. Mar. 04, 2010).
[5] [Ct. Rec. 40 at p. 8.]

cog in the modern-day settlement industry."[6] Often the supposed "facts" are made without citation to the record, and should be disregarded or at least clarified, *e.g.*, "GCS automatically transfers . . . amounts specified by the debt settlement company."[7] Consequently, the central facts pertinent to answering the Certified Questions involve (1) the workings of a bank account the Carlsens and Pophams opened at RMBT, which GCS administered, and (2) the respective parties' relationship to the account, as follows.

A. The "special purpose account."

The Carlsens and Pophams, as the clients of two debt settlement companies wholly unrelated and unaffiliated with either RMBT or GCS, completed and signed account applications to open a "special purpose account" to hold the client's monies for the debt settlement program in which each enrolled. [8] A "special purpose account" is titled in the client's

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[6] [Carlsen Brief at p. 6.]. Lest it be forgotten, the Carlsens and the Pophams are less victims than they portray to this Court. Each willingly sought and incurred consumer debt beyond their ability to repay and, no doubt, still possess, and intend to keep, the consumer products and other figments of their unbridled spending. Both then sought out and contracted with a debt settlement company, but not to work out a mechanism allowing each couple to honor the obligations they undertook and fully repay their debts. No, each contracted with a debt settlement company to specifically avoid the full repayment of their voluntary indebtednesses, instead intending to strike a bargain to pay but a fraction of what they owed. This Court should not allow the hyperbole saturated verbiage of the Carlsen Brief to blind the Court to the real circumstances underlying why, in the first instance, the parties are before this Court: because the Plaintiffs incurred debts and sought a way to avoid repaying them.

[7] [Carlsen Brief at p. 5.]

[8] [Ct. Rec. 70 ¶ 14, Ex. J (Doc. 70-10) pp. 36; 19 & 21; Ex. K; Ct. Rec. 70 at ¶¶ 9 & 11, Ex. E at p. 27 & Ex. F at p. 20; Ct. Rec. 31 Ex. B (31-3); Ct. Rec. 58-11 at ¶ 7.]

name with a unique account number, the monies deposited therein are held by and for the client under the client's control (as with any other typical bank account) and the account is individually and separately covered by FDIC insurance. [9] When the Carlsens and Pophams deposited funds, their special purpose account funds were held "by RMBT in a FDIC-insured custodial account". [10] "The FDIC insures the deposits of each [customer]".[11] RMBT and GCS are "subject to the oversight and examination authority of the Federal Deposit Insurance Corporation and other bank regulatory authorities."[12]

Every deposit into, and disbursement or withdrawal from the special purpose account is authorized by the account-holder and reflected fully on an account statement sent periodically to the client and always available (like any other typical bank account) for review through a secure web site. [13] The "Accounts are structured to grant exclusive authority over the account to the client and to deny control over client funds by any party other than the client."[14] The account-holder has complete control over and access to the account authorizes every disbursement, and is free to

[9] [Ct. Rec. 70 at ¶ 5 Ex. A. (Doc. 70-1) p. 14.]
[10] [Ct. Rec. 58-11 at ¶ 7.]
[11] [Ct. Rec. 58-11 at ¶ 7.]
[12] [Ct. Rec. 58-11 at ¶ 2.]
[13] [Ct. Rec. 58-11 at ¶ 8.]
[14] [Ct. Rec. 58-11 at ¶ 32.] Because the money in the Account belongs to the account-holder, the creditors of the holder "could seek to attach or levy the money in the Account." [Ct. Rec. 58-11 at ¶¶ 11; 32.]

withdraw funds or close the account at any time without penalty.[15] GCS carries "out the instructions of the consumer" with respect to a special purpose account.[16]

All special purpose account transaction information is maintained in GCS' data processing center, in a "proprietary database."[17] The account-holder receives written statements and can review account information 24 hours a day, 7 days a week through GCS' website or the GCS automated phone system, or by speaking to a GCS customer service representative.[18] Likewise, all account transaction information is required to be and is readily available for audit by "both federal and state banking regulators,"[19] just as with any typical bank account. The cost of "maintaining an Account is approximately $10.00 per month, which is competitive with the fees charged for similar FDIC-insured banks for maintaining an account."[20]

B. The individuals and entities involved.

1. The named Plaintiffs.

a) The Carlsens.

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[15] [Ct. Rec. 58-11 at ¶¶ 11, 32 & 33; 28-29.]
[16] [Ct. Rec. 70 at ¶ 5 Ex. A at p. 20 (Doc. 70-1); Ct. Rec. 58-11 at ¶¶ 13-27.]
[17] [Ct. Rec. 58-11 at ¶¶ 11; 33.]
[18] [Ct. Rec. 58-11 at ¶¶ 11; 33.]
[19] [Ct. Rec. 58-11 at ¶ 11.]
[20] [Ct. Rec. 58-11 at ¶ 30.]

The Carlsens "googled" debt settlement companies on the Internet sometime in July 2007, and contacted and then contracted with one of those companies, Freedom Debt Relief.[21] To enhance the effectiveness of the program and improve the chances that money will be available to eventually settle her designated debts, Mrs. Carlsen opened a bank account – a special purpose account – at RMBT, which she knew she owned, managed and controlled.[22]

The Application she signed explained that the account she opened belonged to her and was solely in her control.[23] The Application and the Account Agreement each also explained that GCS was RMBT's agent for administering the transactions she directed in the account.[24] Mrs. Carlsen admitted she authorized the transfer of $684.40 from one of her accounts to the account at RMBT.[25] The Agreement set GCS' monthly fee at $7.50 for administering the account; RMBT collected no fee for holding the Carlsen's account.[26]

During the time the Carlsens were in the debt settlement program, they never tried to contact GCS or RMBT. They did not do so until after

[21] [Ct. Rec. 70 at ¶ 14, Ex. J (Doc. 70-9) pp. 11 & 14.]
[22] [Ct. Rec. 70 ¶ 14, Ex. J (Doc. 70-9) pp. 36; 19 & 21; & Ex. K.]
[23] [Ct. Rec. 70 at ¶ 14, Ex. J pp. 21-23; (Doc. 70-9).]
[24] [Ct. Rec. 70 at ¶ 14, Ex. J pp. 36; 21-23 (Doc. 70-9).]
[25] [Ct. Rec. 70 at ¶ 14, Ex. J p. 26 (Doc. 70-9).]
[26] [Ct. Rec. 70 at ¶¶ 14 & 15 & Ex. J pp. 21-23 (Doc. 70-9) & Ex. K (Doc. 70-11).]

they terminated their Freedom Debt Relief program.[27] During the time the Carlsens were in the debt settlement program, Mrs. Carlsen admitted that GCS never negotiated with any of the Carlsen's creditors.[28]

b) The Pophams.

After hearing a radio advertisement, Mary Popham contacted Silver Bay Financial, a debt settlement company.[29] The Pophams signed a Debt Settlement Service Agreement with Silver Bay, dated January 27, 2009.[30] They also signed a special purpose account application, and agreement.[31] Carl Popham testified that he and Mary knew they would be paying GCS a one time account set up fee of $9.00 and a monthly service fee of $9.85 for the account, as set forth in their Account Agreement.[32] They made deposits into the account, including $628.00 in February 2009.[33] As Mary Popham testified, they understood that neither RMBT nor GCS were going to be negotiating their debts.[34]

2. The non-party debt settlement companies.

Both the Carlsens and Pophams enrolled with a debt settlement company, the Carlsens with Freedom Debt Relief and the Pophams with

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[27] [Ct. Rec. 70 ¶ 14, Ex. J pp. 30-31 (Doc. 70-10).]
[28] [Ct. Rec. 70 at ¶ 14, Ex. J p. 35 (Doc 70-10).]
[29] [Ct. Rec. 70 at ¶¶ 9 & 11; Ex. E at p. 9 (Doc. 70-5) & G (Doc. 70-7).]
[30] [Ct. Rec. 70 at ¶ 9; Ex. E at pp. 12-13.]
[31] [Ct. Rec. 70 at ¶¶ 9 & 11, Ex. E at p. 27 & Ex. F at p. 20; Ct. Rec. 31 Ex. B (31-3).]
[32] [Ct. Rec. 70 at ¶¶ 9 & 11 Ex. F at pp. 23 & 25; Ct. Rec. 31 Ex. B (31-3).]
[33] [Ct. Rec. 70 at ¶¶ 9 & 11 Ex. F at pp. 24-26.]
[34] [Ct. Rec. 70 at ¶¶ 9 & 11 Ex. E at p. 28 & Ex F. at p. 26.]

Silver Bay Financial, Inc., identified on their respective special purpose account agreements.[35] Neither debt settlement company is a party to, and those debt settlement agreements are not at issue in, this case.[36]

3. RMBT and GCS.

RMBT is a "financial institution," a state-chartered bank under Colorado law.[37] GCS is a payment processor and back-office service provider to a number of banks.[38] RMBT and GCS are "subject to the oversight and examination authority of the Federal Deposit Insurance Corporation and other bank regulatory authorities."[39]

GCS was the agent and payment processor for all activity related to the special purpose accounts the Carlsens and Pophams established.[40] GCS as an agent for RMBT provided account reconciliation and handled the electronic Automated Clearing House ("ACH") transfer of monies for the Carlsens and Pophams.[41]

4. Non-party Federal Trade Commission.

Since the District Court certified four questions to this Court, the United States Federal Trade Commission ("FTC") issued a Final Rule

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[35] [Ct. Rec. 31 Ex. A (31-2) & Ex B. (31-3), respectively.]
[36] [Ct. Rec. 40 at p. 2, fn. 2]
[37] [Ct. Rec. 83 at ¶ 7.]
[38] [Ct. Rec. 58-11 at ¶ 2.]
[39] [Ct. Rec. 58-11 at ¶ 2.]
[40] [Ct. Rec. 31 Ex. A (31-2) & Ex. B (31-3), respectively; Ct. Rec. 70-4, Ex. D at ¶¶ 34-35.]
[41] [Ct. Rec. 18 at pp. 3-8.]

amending the Telemarketing Sales Rule ("TSR") to afford direction to those companies the FTC defines as "debt relief companies."[42] The Final Rule imposes a federal scheme of regulation upon "debt relief companies" providing "debt relief services," which are defined as:

> any program or service represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector.[43]

The Final Rule makes clear that a company such as GCS and a bank such as RMBT are ***not*** considered a "debt relief company" because they only provide federally insured bank account and attendant services (from outside the customer's state of residence) and none of the "debt relief services" the Final Rule defines. The Final Rule makes a clear distinction between a "debt relief company", a "debt adjuster" in Washington state parlance, and an "intermediary" company, such as GCS and the banks for which it acts as agent, that establishes and maintains a "dedicated bank

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[42] The District Court certified its questions to this Court on July 23, 2010. The FTC announced the issuance of its Final Rule amending the TSR just five days later, on July 28, 2010. *See* Telemarketing Sales Rule Debt Relief Rule Fact Sheet – 7.28.10 (http://www.ftc.gov/os/2010/07/100729tsrfactsheet.pdf); 16 CFR Part 310 Telemarketing Sales Rule (http://www.ftc.gov/os/2010/07/R411001finalrule.pdf). The regulatory scheme created by the Final Rule became effective, in the main, September 27, 2010. A single provision – the ban on advance collection of fees by the debt relief company - which implicates the roles GCS and banks like RMBT are to play in the future of this industry, becomes effective October 27, 2010.

[43] 16 CFR § 310.2(m).

account" for the customer which is legitimately utilized by the debt relief company for deposit and holding of both its fees and the monies to be eventually paid to the customer's creditors.[44]

This aspect of the Final Rule both codifies and legitimizes two common practices of the debt relief industry that are viciously assailed in this case:

> 1. the opening by the client of a special purpose bank account to be located in a state other than the client's residence into which the client's monies to be used in its debt settlement program are deposited; and
>
> 2. the collection of monies (and fees) in advance which are held in the special purpose account until the debt relief company has negotiated the settlement of an account (in contrast to Washington's requirement of near immediate disbursement).

These now federally sanctioned practices seemingly conflict with and cannot be reconciled with, for instance, RCW § 18.28.080 (as an intermediary's fees are separately authorized) and RCW § 18.28.110(4) (as disbursements are properly made when warranted to pay a creditor). The mechanics for the dedicated bank account which GCS provides under this new federal construct are set out in 16 CFR § 310.4(a)(5)(ii) and should inform the Court's thinking here:

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[44] 16 CFR § 310.4(a)(5)(ii).

> Nothing in § 310.4(a)(5)(i)[45] prohibits requesting or requiring the customer to place funds in an account to be used for the debt relief provider's fees and for payments to creditors or debt collectors in connection with the renegotiation, settlement, reduction, or other alteration of the terms of payment or other terms of a debt, provided that:
> (A) the funds are held in an account at an insured financial institution;
> (B) the customer owns the funds held in the account and is paid accrued interest on the account, if any;
> (C) the entity administering the account is not owned or controlled by, or in any way affiliated with, the debt relief service;
> (D) the entity administering the account does not give or accept any money or other compensation in exchange for referrals of business involving the debt relief service; and
> (E) the customer may withdraw from the debt relief service at any time without penalty, and must receive all funds in the account, other than funds earned by the debt relief service in compliance with § 310.4(a)(5)(i)(A) through (C), within seven (7) business days of the customer's request.

There is nothing new or different here, as the FTC's criteria precisely mirror the terms of the Special Purpose Accounts established by GCS for Carlsen and Popham (and the members of the putative class they seek to represent). Indeed, the FTC cited approvingly to GCS, in particular, in its comments regarding the mechanics of opening and administering the dedicated bank account:

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[45] 16 CFR § 310.4(a)(5)(i) restricts the receipt of the debt relief service's fees in advance of completion of services and creates a proportionality test to be applied to fees paid as earned.

> This requirement [*that the dedicated bank account be located at an insured financial institution*] does not prevent an intermediary that is not an insured financial institution from providing services in connection with the account as well. For example, GCS[46] and Noteworld Servicing Center provide account management and transaction processing services related to special purpose bank accounts that clients of debt settlement companies use....If such an intermediary is used, the bank and the nonbank are both "entities administering the account" under the Final Rule.[47]

Section 310.4(a)(5)(ii) underscores the differences between an intermediary like GCS and a debt relief company. The intermediary cannot be owned or controlled by, or in any way affiliated with, the debt relief company for which it establishes dedicated bank accounts. The intermediary may neither give nor receive referral fees in connection with debt relief services. Indeed, the Final Rule, in several other instances, imposes different, mutually exclusive requirements on intermediaries and debt relief servicers:

1. Debt relief companies cannot collect a fee until a debt is settled or terms are renegotiated and a payment is made. Intermediaries, in contrast, may charge the customer directly for the account services regardless of whether a debt has been settled or terms renegotiated.

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[46] The acronym "GCS" is assigned to Respondent, Global Client Solutions, LLC, in the FTC's List of Commenters and Short-Names/Acronyms Cited in the SBP at pp. 187-89 of the Final Rule.

[47] Final Rule, pg. 121-22, fn. 445.

2. A debt relief company's fees must meet one of two proportionality tests. An intermediary's fees do not need to be related in any way to the amount of the enrolled debt.
3. A debt relief company must operate in strict compliance with the Final Rule. Such terms are not made applicable to the dedicated bank account services proved by intermediaries.

The FTC has explicitly recognized that an intermediary such as GCS is not and cannot be a debt relief company. No contrary finding can be made here, as such would conflict with and be preempted by the FTC's pronouncements on the matter.

III. STANDARD OF REVIEW; CERTIFIED QUESTION SUMMARY

A. THE STANDARD OF REVIEW.

1. *De novo.*

Certified questions from federal court are questions of law that are reviewed *de novo.*[48]

2. The rules of statutory interpretation apply.

When called upon to interpret a statute the objective is to ascertain and carry out the legislature's intent.[49] If a statute's meaning is plain on its

[48] *Bradburn v. North Cent. Regional Library Dist.*, 168 Wn.2d 789, 799, 231 P.3d 166, 172 (2010).
[49] *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375, 383-84 (2004).

face, a court must give effect to that meaning.[50] Under this plain meaning rule, a court may look at both the wording of the statute and of related statutes or other provisions of the same act.[51]

Where a statute is plain on its face, a court should ***not*** engage in judicial construction by adding language to the statute.[52] An undefined statutory term is to be given its usual and ordinary meaning.[53] Only if the statute remains susceptible to more than one reasonable meaning after such an inquiry is the statute ambiguous, at which point the Court may resort to various statutory construction aides, including legislative history.[54] Even then, statutory provisions and aides to construction should be harmonized whenever possible.[55]

B. QUESTIONS PRESENTED AND SUMMARY OF ANSWERS

1. Question No. 1:

> Is a for-profit business engaged in "debt adjusting" as defined in RCW § 18.28.010(1) when, in collaboration with debt settlement companies, it: a) establishes and maintains a custodial bank account in its name; b) solicits debtors' establishment of a sub-account to receive and hold periodic payments to be used to pay debt settlement fees and pay settlements with creditors as negotiated by a debt settlement company; and c) as custodian for the debtor

[50] *Murphy*, 88 P.3d at 383-84.
[51] *Murphy*, 88 P.3d at 383-84.
[52] *See, e.g., Restaurant Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003) ("a court must not add words where the legislature has chosen not to include them").
[53] *Christensen v. Ellsworth*, 162 Wn.2d 365, 372, 173 P.3d 228, 232 (2007).
[54] *Murphy*, 88 P.3d at 383-84.
[55] *Christensen*, 173 P.3d at 232.

receives and holds the debtor's periodic payments in a sub-account, paying from that account debt settlement fees and negotiated settlements with creditors?

ANSWER: No. Even accepting that RMBT and GCS engage in the activities described in Question No. 1, RMBT and GCS are not engaged in "debt adjusting" as defined in RCW § 18.28.010(1). RMBT and GCS are not holding themselves out as engaging in the business of debt adjusting for compensation. Nor are they "debt adjusters" as defined in RCW § 18.28.010(2) because they are only providing banking services for accounts owned and controlled by debtors, which services do not afford RMBT or GCS either receipt or control of debtors' monies and thus do not include debt adjusting activities.

2. Question No. 2:

Does the exclusion found at RCW § 18.28.010(2)(b) apply to a for-profit business described in Question No. 1?

ANSWER: Yes. The exclusion in RCW § 18.28.010(2)(b) applies to any person, partnership, association, or corporation such as RMBT and GCS (1) doing business relating to banks; and (2) doing business under and as permitted by any law of this state or of the United States relating to banks. RMBT and GCS do both and do not

engage in debt adjusting activities or hold themselves out as engaging in the business of debt adjusting for compensation.

3. **Question No. 3:**

> Do the fee limitations set forth in RCW § 18.28.080 apply to for-profit settlement companies engaged in soliciting the participation of debtors in a debt management program involving: a) monthly set aside and accumulation of a debtor's funds in a custodial account for the purposes of facilitating negotiated settlement of specified credit card debts; and b) negotiations by the debt settlement company, on behalf of the debtor, to secure compromise settlement of the debtor's credit card debt, to be paid from the custodial account?

ANSWER: No. By its plain language, the fee limitations set forth in RCW § 18.28.080 apply only to a debt adjuster, who by contract charges a fee for debt adjusting.

4. **Question No. 4:**

> Does the Debt Adjusting statute provide for an implied civil action against an alleged "aider or abettor" where aiding or abetting a violation of the Debt Adjusting statute is expressly made a crime pursuant to RCW § 18.28.190.

ANSWER: No. When the Legislature has provided an adequate remedy in the statute, as in the Debt Adjusting statute, no cause of action should be implied and no cause of action for civil aiding and abetting will be implied when the Debt Adjusting language does not support creating such a remedy.

IV. ARGUMENT

In the Order that gave rise to the Certified Questions, the U.S. District Court framed the salient issue by asking:

> Are GCS and RMBT engaged in "debt adjusting" as defined in RCW § 18.28.010(1), and if so, are they "debt adjusters" as defined in RCW § 18.28.010(2), or are they entities "doing business under and as permitted by any law of this state or of the United States relating to banks. . . ."?[56]

Rather than begin, as they should, with the statute to underpin their argument that RMBT and GCS are debt adjusting, are debt adjusters and are not statutorily exempt from the debt adjusting statute, Carlsen and Popham back into each certified question based on a false central premise that has permeated their prosecution of this lawsuit: that RMBT and GCS are collaborators, "aiding and abetting" the exaction of "predatory fees" by others who are in the debt settlement business. On that basis Carlsen and Popham implicitly argue that the mere presence of a debt settlement company *per force* establishes that GCS and RMBT too are involved in debt adjusting as collaborators, which makes them debt adjusters and, hence, not exempt under the statute.

As discussed next, by statutory definition neither RMBT nor GCS are debt adjusting or debt adjusters, even if they were not by the express

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[56] *Carlsen*, 2010 WL 786254 at *4.

language in the statute exempt from its application. Certified Question 1, 3 and 4, therefore, must be answered: No, while Certified Question 2 is answered: Yes.

A. QUESTION 1: RMBT AND GCS ARE NOT ENGAGED IN "DEBT ADJUSTING" AND, SO THEY ARE NOT "DEBT ADJUSTERS" BECAUSE THEY ARE PROVIDING BANKING SERVICES, WHICH DO NOT INCLUDE DEBT ADJUSTING ACTIVITIES.

The keystone premise to the first Carlsen/Popham argument on Certified Question 1 is that the definitional language in RCW § 18.28.010 is "sufficient but non-essential,"[57] meaning they can cherry-pick those words that please them (*e.g.* "distribution"), while discarding those troublesome extra "non-essential" words (*e.g.* "receipt") the Legislature, saw fit to include in this definition. This sets up the second false premise in the Carlsen/Popham syllogism, which is heavily laden with debt adjusting sounding activities that they unwittingly say RMBT and GCS do not do. Carlsen and Popham then attempt to reason to the conclusion that RMBT and GCS are debt adjusters based on what others do by saying:

> A company that **collaborates** with debt settlement companies by serving as custodian and manager of debt settlement funds, accumulated over time, for the express purpose of achieving compromise settlements with multiple creditors, and who ultimately allocates those funds among those creditors in accordance with settlements achieved, is

[57] Carlsen Brief at p. 13 ("**receipt and distribution of the debtor's funds [is] a sufficient but non-essential condition for the application of the statute**." (Emphasis added).

> clearly engaged in "distributing funds among creditors" within the meaning and contemplation of Washington's Debt Adjusting statute.[58]

On this basis Carlsen and Popham conclude that the "[t]he first question posed by the district court sets forth conditions constituting 'debt adjusting' within the meaning of RCW § 18.28.010(1)."[59] The "conditions" in Certified Question 1, however, do not prime the statutory language; instead, the facts as applied to the statutory language answer the Certified Question. Consequently, the Carlsen and Popham argument on Certified Question 1 fails and the Question must be answered **No**, as discussed next.

1. The conclusion that RMBT and GCS are debt adjusting rests on a false premise that the statutory language is "non-essential."

Carlsen and Popham argue that compared to the other 49 states in the Union, Washington's statute aligns itself in the "non-essential condition" "camp". On this assertion, Carlsen and Popham argue quite incredibly that the literal definitional language is of no import. Specifically, they say that "receipt ***and*** distribution [are] sufficient but **non-essential**" when "applying" the "debt adjusting" definition on which they rely.[60] This "non-essential" language contention – reinventing the

[58] [Carlsen Brief p. 16; (emphasis added).]
[59] [Carlsen Brief p. 16.]
[60] [Carlsen Brief at pp. 12-13; (emphasis added).]

original conjunctive phrasing (***both*** receipt and disbursement of funds are required) to become disjunctive (disbursement without receipt is enough) - is made so that Carlsen and Popham can argue that RMBT and GCS are engaged in activities that fall "within the meaning and **contemplation** of Washington's Debt Adjusting statute,"[61] even if not its literal reading.

To reach the conclusion that what RMBT and GCS do is within the "contemplation" of the statute, Carlsen and Popham argue that "the statutory terms are plain and unambiguous", and advise this Court to "assume the legislature meant exactly what it said and [to] decline to construe the statute otherwise." [62] Yet, they actually argue that this Court should ignore words actually recited in the statute while at the same time read into the statute what they say is within the "contemplation" of the statute. The best evidence of what was contemplated by the Legislature, however, is the statute and its legislative history.

RCW § 18.28.010 states:

> (1) **Unless a different meaning is plainly required by the context**, the following words and phrases as hereinafter used in this chapter shall have the following meanings:
> **"Debt adjusting" means** the managing, counseling, settling, adjusting, prorating, or liquidating of the indebtedness of a debtor, or **receiving funds for the purpose of distributing said funds among creditors in payment or partial payment of obligations of a debtor**.

[61] [Carlsen Brief p. 16; (emphasis added).]
[62] [Carlsen Brief at p. 15.]

> (2) "**Debt adjuster**", which includes any person known as a debt pooler, debt manager, debt consolidator, debt prorater, or credit counselor, **is any person engaging in or holding himself or herself out as engaging in the business of debt adjusting for compensation**. **The term shall not include**:
>
> (b) **Any** person, partnership, association, or **corporation doing business under and as permitted by any law of this state or of the United States relating to banks.** . . .[63]

As the plain language makes clear, RCW § 18.28.010(1) and (2) must be read together to form the required contemplated context for defining debt adjusting, since debt adjusting can only be done by a "debt adjuster."

With respect to RCW § 18.28.010(1) and (2) the Washington Legislature explained what activities would define a debt adjuster:[64]

> 4. Basic Method of Operation – Debt Adjusters
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> **Debt adjusters**, through referral, advertising or other means, **endeavor to make contact with those individuals having substantial and overdue personal bills**. They then **endeavor to establish a contractual relationship between themselves and the debtor, under terms of which the debtor transmits to the debt adjuster the maximum monthly payment possible.** In return, the debt adjuster **endeavors to work out a repayment plan, under terms of which the debtor's payment is divided among his outstanding creditors**. **Monthly checks representing portions of the debtor's payment to the debt adjuster, are written by the debt adjuster to the creditors**. For this service, the debt adjuster charges a usual fee of 15 percent of all payments made to him by the debtor. In addition, he may lawfully charge a termination

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[63] (Emphasis added).

[64] "*Performance Audit of Debt Adjusting, Licensing and Regulatory Activities,*" Report No. 77-13, Jan. 20, 1978 at p. 8 (on file with Wash. State Archives, H.B. 86 (Wash. 1979)).

> fee of $75 or six percent of the remaining debts, whichever is less, in the event the debtor discontinues participation in the plan prior to completion.

So, as required by the context, a debt adjuster "endeavors" (1) to make contract with a debtor; (2) to establish a contractual relation; (3) to work out a repayment plan with creditors; and (4) to write monthly checks to creditors.

As the foregoing language and the facts in this case demonstrate, neither RMBT nor GCS are (or ever were): (1) endeavoring to make contract with those with substantial and overdue bills; (2) endeavoring to establish a contractual relationship with a debtor; (3) endeavoring to work out a repayment plan for the debtor; and (4) writing checks to the debtor's creditors. There is not a single fact that even leads to an inference that the basic method of operation of either RMBT or GCS is debt adjusting. Indeed, all the evidence is to the contrary. Performing the traditional functions of a bank or serving as a processing agent for a bank are not contemplated activities under RCW § 18.28.010(1) and (2).

With respect to RCW § 18.28.010(2), which along with (1) frames the context of the statute and the definition of debt adjusting, the Legislature further defined an additional necessary quality of a "debt adjuster" who are not exempt. Specifically, in addition to the other requirements in RCW § 18.28.010(1), a debt adjuster under RCW §

18.28.010(2) is "**any person engaging in or holding himself or herself out as engaging in the business of debt adjusting for compensation**." Holding out is the operative phrase. Ignoring the statutory exemptions following the definition in RCW § 18.28.010(2) for a moment, Carlsen and Popham cannot point to anything that RMBT or GCS said or did that led the Carlsens and Pophams to believe that the bank and its processing agent were holding themselves out to be in the business of debt adjusting. Indeed, both specifically acknowledge they knew neither RMBT nor GCS would be negotiating with their respective creditors.

The objective here is to carry out the legislature's intent, not the Carlsen and Popham conclusion about the ***un***importance of express language the Legislature saw fit to include in the statute.[65] There is nothing in this language in RCW § 18.28.010(1) that says it is "non-essential" or that the words in RCW § 18.28.010(2) have no meaning. What is non-essential are the contrived conclusions the Carlsens and Pophams offer. If the language is "non-essential," then the statutory words themselves are superfluous and unimportant in deciding whether RMBT and GCS are "debt adjusting." As the foregoing shows, the words debt adjusting and debt adjuster have a

[65] *Murphy*, 88 P.3d at 383-84.

rich and specific legislative history that explains what constitutes debt adjusting and being a debt adjuster; this language is not "non-essential."

2. The conclusion that RMBT and GCS are debt adjusting and debt adjusters rests on a false premise that the acts of others is all that is necessary to satisfy the statutory definition.

The undoing of the Carlsen and Popham attempt to support their answer to Certified Question No. 1 is the single operative word "**collaboration**," which is coupled with value laden terms that do not describe what RMBT and GCS do, but, rather, are attributed to others. Carlsen and Popham believe that, by virtue of their untenable and omnipresent aiding and abetting assertions, the statute means that neither RMBT nor GCS actually have to be doing anything described in the statute to be a debt adjuster. After all, for Carlsen and Popham the activities of debt adjusting are "non-essential" and RMBT and GCS have by their fiat been branded as collaborators in debt settlement and thus debt adjusters despite any legislative intent for such a "status" to suffice. Unsurprisingly, the statute and facts in this case show something quite different from what Carlsen and Popham portray, as discussed next.

a) The Carlsens and Pophams managed the funds received by and distributed from their special purpose accounts.

The Carlsens and Pophams signed account applications to open an individually numbered and federally insured "special purpose account,"[66] which was titled in their names.[67] They deposited and received money into their own accounts, and they authorized the distribution of their own monies from their own accounts.[68]

All account transaction information reflecting how the Carlsens and Pophams managed their own accounts was (and is) maintained in GCS' data processing center, in a "proprietary database."[69] Moreover, the Carlsens and Pophams could review their own account information 24 hours a day, 7 days a week through GCS' website or the GCS automated phone system, or by speaking to a GCS customer service representative.[70] Thus, the Carlsens and Pophams had complete control over and access to their own accounts and funds, and they were free to deposit or withdraw funds or to close their account at any time without penalty.[71]

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[66] [Ct. Rec. 70 ¶ 14, Ex. J (Doc. 70-10) pp. 36; 19 & 21; Ex. K; Ct. Rec. 70 at ¶¶ 9 & 11, Ex. E at p. 27 & Ex. F at p. 20; Ct. Rec. 31 Ex. B (31-3); Ct. Rec. 58-11 at ¶ 7.]
[67] [Ct. Rec. 70 at ¶ 5 Ex. A. (Doc. 70-1) p. 14.]
[68] [Ct. Rec. 70 at ¶ 14, Ex. J p. 26 (Doc. 70-9); Ct. Rec. 70 at ¶¶ 9 & 11 Ex. F at pp. 24-26.]
[69] [Ct. Rec. 58-11 at ¶¶ 11; 33.]
[70] [Ct. Rec. 58-11 at ¶¶ 11; 33.]
[71] [Ct. Rec. 58-11 at ¶¶ 11, 32 & 33; 28-29.]. Note also that these attributes bring the special purpose accounts administered by GCS squarely within the framework of "dedicated bank accounts" administered by an "intermediary" identified by the Federal Trade Commission in its Final Rule amendments to the Telemarketing Sales Rule to ***facilitate compliance*** by the debt relief companies. Oddly, this is exactly the opposite result the Carlsens and Pophams advocate here. Under the TSR amendments , GCS ***is*** an intermediary and ***is not*** a debt adjuster (a "debt relief company" in the FTC's jargon).

The Carlsens and Pophams used the special purpose account because it made possible an Automated Clearing House ("ACH") process, which is a service banks commonly perform.[72] ACH transactions are payment instructions to either debit or credit a deposit account.[73] An ACH transaction is essentially an electronic funds transfer between originating and receiving financial institutions.[74] ACH payments can either be credits originated by the accountholder sending funds (payer), or debits originated by the accountholder receiving funds (payee).[75] Indeed, Mrs. Carlsen admitted she authorized the transfer of $684.40 from one of her accounts to her and her husband's account at RMBT.[76] The Pophams likewise admitted that they made deposits into their account at RMBT, including $628.00 in February 2009.[77]

ACH payments are used in a variety of payment environments. Originally, customers like the Carlsens and Pophams primarily used the ACH service for paycheck direct deposits.[78] Now, they increasingly use the ACH architecture for bill payments (often referred to as direct payments), corporate payments (business-to-business), and government

[72] [Ct. Rec. 21 at pp. 6-8; Ct Rec. 28 at pp. 6-7.]
[73] [Ct. Rec. 21 at pp. 6-8; Ct Rec. 28 at pp. 6-7.]
[74] [Ct. Rec. 21 at pp. 6-8; Ct Rec. 28 at pp. 6-7.]
[75] [Ct. Rec. 21 at pp. 6-8; Ct Rec. 28 at pp. 6-7.]
[76] [Ct. Rec. 70 at ¶ 14, Ex. J p. 26 (Doc. 70-9).]
[77] [Ct. Rec. 70 at ¶¶ 9 & 11 Ex. F at pp. 24-26.]
[78] [Ct. Rec. 21 at pp. 6-8; Ct Rec. 28 at pp. 6-7.]

payments (e.g., tax refunds).[79] The Carlsens and Pophams used these accounts here for both direct deposits and direct payments.

The operating rules of the National Automated Clearinghouse Association govern all ACH transactions.[80] All account transaction information, including for the accounts the Carlsens and Pophams held and managed, is required to be and is readily available for audit by "both federal and state banking regulators."[81] Just like any other bank account they own, the Carlsens and Pophams managed the funds held in their special purpose accounts. They sent funds to and received funds in the account, and then authorized distribution of funds from their account to their respective creditors. To say RMBT and GCS acted as debt adjusters who "managed" the Popham and Carlsen accounts is misleading and wrong because an ACH transaction is simply the mechanism that permits the account holders to efficiently use their accounts.

b) The Carlsens and Pophams allocated the funds in their special purpose accounts.

In the ACH environment, the Carlsens and Pophams authorized every transaction from their accounts.[82] The transactions they authorized

[79] [Ct. Rec. 21 at pp. 6-8; Ct Rec. 28 at pp. 6-7.]
[80] [Ct. Rec. 21 at pp. 6-8; Ct Rec. 28 at pp. 6-7.]
[81] [Ct. Rec. 58-11 at ¶ 11.]
[82] [Ct. Rec. 58-11 at ¶ 8.]

were reflected fully and clearly on the account statements they received.[83] Indeed, by design, the accounts are structured to deny control over funds in the accounts by anyone other than them.[84] They had complete control over and access to the account and funds, and they were free to withdraw funds or close the account at any time without penalty.[85] All GCS did was carry out their instructions using the ACH process with respect to the funds in their accounts.[86] Indeed, Mary Popham testified unequivocally that she and her husband understood that neither RMBT nor GCS were going to be negotiating their debts.[87] Likewise, Mrs. Carlsen admitted that GCS never negotiated with any of their creditors.[88]

To say that RMBT and GCS "allocated (distributed) funds" as a debt adjuster under the language of the statute is misleading and wrong; an ACH transaction simply employs an electronic mechanism and process that permits the account holders – the Carlsens and the Pophams – to direct the bank and its processor to issue payments. Providing an ACH service is not debt adjusting; it does not make RMBT and GCS debt adjusters because neither of them is receiving or distributing the funds.

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[83] [Ct. Rec. 58-11 at ¶ 8.]
[84] [Ct. Rec. 58-11 at ¶ 32.] Because the money in the Account belongs to the account-holder, the creditors of the holder "could seek to attach or levy the money in the Account." [Ct. Rec. 58-11 at ¶¶ 11; 32.]
[85] [Ct. Rec. 58-11 at ¶¶ 11, 32 & 33; 28-29.]
[86] [Ct. Rec. 70 at ¶ 5 Ex. A at p. 20 (Doc. 70-1); Ct. Rec. 58-11 at ¶¶ 13-27.]
[87] [Ct. Rec. 70 at ¶¶ 9 & 11 Ex. E at p. 28 & Ex F. at p. 26.]
[88] [Ct. Rec. 70 at ¶ 14, Ex. J p. 35 (Doc 70-10).]

Rather, employing procedures used millions of times daily throughout the commercial banking system, RMBT and GCS were simply processing and effectuating the instructions of a bank account-holder, a function specifically deemed by the FTC to not be debt adjusting.

B. QUESTION 2: THE EXCLUSION IN RCW § 18.28.010(2)(b) APPLIES TO RMBT AND GCS, WHO ARE: (1) DOING BUSINESS RELATING TO BANKS; AND (2) DOING BUSINESS UNDER AND AS PERMITTED BY ANY LAW OF THIS STATE OR OF THE UNITED STATES RELATING TO BANKS.

RMBT is a state-chartered bank under Colorado law.[89] GCS was RMBT's agent and payment processor for all activity related to the accounts the Carlsens and Pophams established.[90] RMBT and GCS are "subject to the oversight and examination authority of the Federal Deposit Insurance Corporation and other bank regulatory authorities."[91] Despite these facts, Carlsen and Popham say that the exclusion in RCW § 18.28.010(2)(b) does not "extend to" to either RMBT or GCS that are "not a financial institution."[92] Carlsen and Popham argue that neither RMBT nor GCS are exempt because

> "managing debt settlement funds in **collaboration** with debt settlement companies is not 'doing business under and

[89] [Ct. Rec. 83 at ¶ 7.]
[90] [Ct. Rec. 31 Ex. A (31-2) & Ex. B (31-3), respectively; Ct. Rec. 70-4, Ex. D at ¶¶ 34-35.]
[91] [Ct. Rec. 58-11 at ¶ 2.]
[92] [Carlsen Brief pp. 17-20.]

> as permitted by the laws of this state or of the United States relating to banks'."[93]

Unsurprisingly, the reasoning is unsupported by a plain reading of the statute which is status not conduct based, and is contrary to the facts.

> RCW § 18.28.010 states:
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> (2) "**Debt adjuster**", which includes any person known as a debt pooler, debt manager, debt consolidator, debt prorater, or credit counselor, is any person engaging in or holding himself or herself out as engaging in the business of debt adjusting for compensation. The term **shall not include**:
>
> (b) **Any** person, partnership, association, or **corporation doing business under and as permitted by any law of this state or of the United States relating to banks . . .**;[94]

"A court must not add words where the legislature has chosen not to include them."[95] Carlsen and Popham, however, want the Court to read the words "financial institution" into the provision so that it reads:

> The term (debt adjuster) shall not include: (b) Any . . . corporation doing business [***as a financial institution***] under and as permitted by any law of this state or of the United States relating to banks.[96]

If read this way, Carlsen and Popham suggest, RMBT ceases to be a bank and GCS ceases to be a bank's agent regulated under the laws of the U.S. simply because each is alleged by them to be working in "collaboration

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[93] [Carlsen Brief pp. 19-20; (emphasis added).]
[94] (Emphasis added).
[95] *Cananwill, Inc.*, 80 P.3d at 598.
[96] Brackets, italics and emphasis supplied..

with debt settlement companies."[97] The operative language the Legislature chose, however, is

> **The term (debt adjuster) shall not include**: (b) Any . . . corporation doing business under and as permitted by any law of this state or of the United States **relating to banks**.[98]

There are ***only*** two requirements in this provision, that a corporation be: (1) doing business relating to banks; and (2) doing business under and as permitted by any law of this state or of the United States relating to banks. The undisputed facts here are that RMBT is a state-chartered bank under Colorado law.[99] GCS is an agent of, a payment processor for and back-office service provider to a number of banks, including RMBT[100], a function specifically recognized and endorsed by the FTC. RMBT and GCS are both "subject to the oversight and examination authority of the Federal Deposit Insurance Corporation and other bank regulatory authorities."[101] So, both RMBT and GCS are doing business relating to banks and are doing so under and as permitted by any law of the United States relating to banks. There is no limitation in the statute to just "financial institutions," and if the Legislature intended that

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[97] [Carlsen Brief pp. 19-20; (emphasis added).]
[98] RCW § 18.28.010(2)(b); (emphasis added).
[99] [Ct. Rec. 83 at ¶ 7.]
[100] [Ct. Rec. 58-11 at ¶ 2.]
[101] [Ct. Rec. 58-11 at ¶ 2.]

meaning, the Legislature could have supplied those very words, but it did not. RMBT and GCS fall well within the exemption.

Carlsen and Popham would have this Court conclude that although their money is held in a federally insured, uniquely numbered account they opened at RMBT, a state chartered bank, that they own and that they control by telling GCS who to send their money to through the ACH process, neither RMBT nor GCS are "doing business . . . relating to banks"; and neither RMBT nor GCS, as consequence of the fact that the Carlsens and the Pophams were in debt settlement programs, are doing business as permitted by any law of the United States relating to banks. The facts, as discussed above show otherwise. Thus, under RCW § 18.28.010(2)(b) RMBT and GCS are exempt from the Debt Adjusting statute.

As a fall back argument urging this Court to read into the provision the "financial institution" language, the Carlsens and Pophams express a policy concern that applying the exemption to a bank and its processing agent would "render the Debt Adjusting statute's consumer protections illusory."[102] The concern is expressed, like previous arguments, in circular fashion. They say because "an expansive reading of the exemption . . . would render the Debt Adjusting statute's consumer protections illusory"

[102] [Carlsen Brief. p. 19.]

"the exemption would eviscerate the consumer protections afforded by chapter 18.28 RCW."[103] This reasoning is insufficient to ignore the plain meaning of the statute.

For one thing, both RMBT and GCS are subject to oversight by a federal regulatory body and are subject to the operating rules of the National Automated Clearinghouse Association ("NACHA") governing ACH transactions.[104] Such effective alternative regulation is why the exemption exists in the first place. The fear Carlsen and Popham express here that a debt adjuster would be exempt because its "functions invariably [are] performed in conjunction with some bank" conveniently ignores there are two aspects of the doing business requirement, it must be: (1) relating to banks and (2) as permitted by the laws of this state or of the United States relating to banks. Applying the plain meaning of this provision to RMBT and GCs will not undermine the Debt Adjusting statute, something with which the FTC seemingly concurs, as the FTC distinguished GCS from the debt relief companies it was committing to regulate.

For another thing, applying the exemption will not excuse everyone from application of the statute. Under the plain meaning rule, the

[103] [Carlsen Brief. p. 19.]
[104] [Ct. Rec. 21 at pp. 6-8; Ct Rec. 28 at pp. 6-7.]

Court looks at both the wording of the statute and the wording of other provisions of the same act.[105] In this regard, RCW § 18.28.910 provides:

> If any provision of this act, or its application to any person or circumstance, is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances, is not affected.

Just because this Court concludes that RMBT and GCS are exempt does not mean others who do not fall within the language of the exemption, are suddenly going to be declared exempt. The fear of dire public policy consequences by giving the exemption its plain meaning is nothing more that an unsupported contention that the entire statutory scheme collapses if RMBT and GCS are exempt from the Debt Adjusting statute.

Implicit in Carlsen/Popham's postulate is that if RMBT and GCS are accorded the exempt status to which they are statutorily entitled, debt adjusters otherwise subject to Washington's debt adjuster law will *en masse* circumvent it by obtaining state or federal bank charters, thus willingly subjecting themselves, *inter alia*, to OCC governance, FDIC capital requirements and oversight, and NACHA compliance rather than Washington's Debt Adjuster law. If those debt adjusters *cum* banks and bank's agents willingly submit to the simultaneous governance of a state banking regulator, the U.S. Department of the Treasury, the Federal

[105] *Murphy*, 88 P.3d at 383-84.

Reserve, the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation, the Washington Legislature's aim of an effective regulatory framework – either as a debt adjuster or as a bank – will certainly have been accomplished. There is simply no substance to Carlsen/Popham's fears that somehow those the Legislature saw fit to exclude from the definition of "debt adjuster" will escape meaningful regulation. The FTC in its Final Rule similarly concluded that the intermediaries who administer the dedicated bank accounts need not be regulated as "debt relief companies," again deferring to the legion of other state and federal governmental and quasi governmental agencies that already provide comprehensive oversight to those companies.

One likewise cannot ignore the realities of what RMBT and GCS actually do. Deeming them debt adjusters, for instance, statutorily presumes they manage, counsel, settle, adjust, prorate and/or liquidate consumer debts,[106] functions the record makes clear they do not do. That makes compliance with other mandatory aspects of the Debt Adjuster Act impossible. For example, RCW § 18.28.100 specifies mandatory contractual terms which do not describe the relationship between RMBT and GCS and the customer. And RCW § 18.28.110 ostensibly requires RMBT and GCS to perform certain services customarily provided by debt

[106] RCW § 18.28.010(1).

settlement companies that RMBT and GCS are fundamentally incapable of doing. It further bears noting that, especially as to the reputed requirements of RCW § 18.28.110, such activities would seemingly conflict with the well defined and limited role that GCS and banks such as RMBT will play as "intermediaries" under the FTC's Final Rule construct, a construct under which GCS is definitely not a "debt relief company."

The provision says what it says, and no amount of fear-mongering changes its plain meaning: RMBT and GCS are excluded from the definition of "debt adjuster" and are exempt from the Debt Adjusting statute. Consequently, the Carlsen/Popham argument on Certified Question 2 fails and the Question must be answered **Yes**.

C. QUESTION 3: BY ITS PLAIN LANGUAGE, THE FEE LIMITATIONS SET FORTH IN RCW § 18.28.080 APPLY ONLY TO A DEBT ADJUSTER, WHO BY CONTRACT CHARGES A FEE FOR DEBT ADJUSTING.

Carlsen and Popham argue that RMBT and GCS are "debt adjusting" and that each is "aiding and abetting" others, who are violating the Debt Adjusting statute and Consumer Protection Act by charging "predatory" fees beyond the statutorily permitted percentage.[107] The false premise Carlsen and Popham set up in their response to Certified Question 3 is that RMBT and Global are:

[107] [Carlsen Brief p. 20; Ct. Rec. 83 at ¶¶ 1, 35, 39 & 44.].

> engaged in "settling," "adjusting," "liquidating," or "managing" the "indebtedness" of a debtor within the meaning of RCW § 18.28.010, when it undertakes the task of negotiating compromise settlements of debts on behalf of an indebted consumer. **Such a company is engaged in "debt adjusting" without regard for whether it directly receives funds from the debtor for purposes of paying the compromise settlement**. A company that engages in such activities is a "debt adjuster" within the meaning of RCW § 18.28.010(2). It is, therefore, subject to the fee limitations set forth in RCW § 18.28.080.[108]

So, Carlsen and Popham claim RMBT and GCS are engaged in debt adjusting and are debt adjusters who violated RCW § 18.28.080 which states:

> (1) **By contract a debt adjuster may charge a reasonable fee for debt adjusting services**. **The total fee for debt adjusting services may not exceed fifteen percent of the total debt listed by the debtor on the contract**. **The fee retained by the debt adjuster from any one payment made by or on behalf of the debtor may not exceed fifteen percent of the payment**. **The debt adjuster may make an initial charge of up to twenty-five dollars which shall be considered part of the total fee**. If an initial charge is made, no additional fee may be retained which will bring the total fee retained to date to more than fifteen percent of the total payments made to date. No fee whatsoever shall be applied against rent and utility payments for housing.
>
> In the event of cancellation or default on performance of the contract by the debtor prior to its successful completion, the debt adjuster may collect in addition to fees previously received, six percent of that portion of the remaining indebtedness listed on said contract which was due when

[108] [Carlsen Brief p. 10 (emphasis added).]

> the contract was entered into, but not to exceed twenty-five dollars.
>
> (2) A debt adjuster shall not be entitled to retain any fee until notifying all creditors listed by the debtor that the debtor has engaged the debt adjuster in a program of debt adjusting.

Under the plain meaning of the statute and on the facts, however, RMBT and GCS are not debt adjusting, are not debt adjusters, and they are not collecting a "predatory fee." Consequently, the Carlsen/Popham argument on Certified Question 3 fails and the Question must be answered **No**, as discussed next.

1. Neither RMBT nor GCS are "debt adjusters" under RCW § 18.28.010(1).

Contrary to what Carlsen and Popham argued in Certified Question 1,[109] they now claim RMBT and GCS are "debt adjuster(s)" because RMBT and GCS are "debt adjusting." Specifically, Carlsen and Popham argue that RMBT and GCS are "undertak[ing] the task of **negotiating** compromise settlements of debts on behalf of an indebted consumer."[110] Of course there are no facts offered by Carlsen or Popham because there are none to back this bare legal assertion. There are, however, plenty of

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[109] Previously, Carlsen and Popham asked this Court to conclude that RMBT and GCS are debt adjusting because they are "receiving funds for the purpose of distributing said funds among creditors in payment or partial payment of obligations of a debtor" under RCW § 18.28.010(1). Now they are saying that RMBT and GCS are debt adjusting even though they do not directly receive the funds, since the Carlsens and Pophams deposit the funds into their own accounts.

[110] [Carlsen Brief pp. 10 & 21; (emphasis added).]

facts that show why the assertion that RMBT and GCS undertook, negotiated and compromised debt for the Carlsens and Pophams is false.

The Carlsens opened a bank account at RMBT.[111] The Account belonged to them, was solely in their control, and was held solely on their behalf.[112] GCS was RMBT's agent for administering the transactions in the Account.[113] **Mrs. Carlsen admitted that GCS never negotiated with their creditors**.[114]

The Pophams signed an account application and agreement, and opened an account.[115] The account was titled in their name and held on their behalf.[116] **As Mary Popham testified, they understood that neither RMBT nor GCS were going to be negotiating their debts**.[117]

The Carlsens and Pophams authorized every one of their respective account transactions.[118] By design, no one else had control over the Carlsen or Popham accounts.[119] Indeed, they not only had complete control over and access to the account and funds and authorized every

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[111] [Ct. Rec. 70 ¶ 14, Ex. J (Doc. 70-9) pp. 36; 19 & 21; & Ex. K.]
[112] [Ct. Rec. 70 at ¶ 14, Ex. J pp. 21-23; (Doc. 70-9); Ct. Rec. 70 at ¶ 5 Ex. A. (Doc. 70-1) p. 14.]
[113] [Ct. Rec. 70 at ¶ 14, Ex. J pp. 36; 21-23 (Doc. 70-9).]
[114] [Ct. Rec. 70 at ¶ 14, Ex. J p. 35 (Doc 70-10).]
[115] [Ct. Rec. 70 at ¶¶ 9 & 11, Ex. E at p. 27 & Ex. F at p. 20; Ct. Rec. 31 Ex. B (31-3).]
[116] [Ct. Rec. 70 at ¶ 5 Ex. A. (Doc. 70-1) p. 14.]
[117] [Ct. Rec. 70 at ¶¶ 9 & 11 Ex. E at p. 28 & Ex F. at p. 26.]
[118] [Ct. Rec. 58-11 at ¶ 8.]
[119] [Ct. Rec. 58-11 at ¶ 32.]. Because the money in the Account belongs to the account-holder, the creditors of the holder "could seek to attach or levy the money in the Account." [Ct. Rec. 58-11 at ¶¶ 11; 32.]

disbursement, they were also free to withdraw funds or close their accounts at any time without penalty.[120] All GCS did was carry out an ACH process based on instructions given by the Pophams and Carlsens.[121]

As the discussion above and the foregoing facts show, neither RMBT nor GCS were "managing, counseling, settling, adjusting, prorating, or liquidating of the indebtedness of" the Carlsens or the Pophams under RCW § 18.28.010(1); and, because RCW § 18.28.010(1) has to be read in conjunction with (2), neither is holding itself out as being engaged in debt adjusting as a debt adjuster, even assuming neither is exempt.

2. RMBT charged no fee, and GCS charged a nominal fee for the account.

The cost of "maintaining an Account is approximately $10.00 per month, which is competitive with the fees charged by similar FDIC-insured banks for maintaining an account."[122] The Carlsens paid $7.50 per month for administering the account; RMBT collected no fee for holding the Carlsen's account.[123] Carl Popham testified that he and Mary knew they would be paying GCS a one time account set up fee of $9.00 and a

[120] [Ct. Rec. 58-11 at ¶¶ 11, 32 & 33; 28-29.]
[121] [Ct. Rec. 70 at ¶ 5 Ex. A at p. 20 (Doc. 70-1); Ct. Rec. 58-11 at ¶¶ 13-27.]
[122] [Ct. Rec. 58-11 at ¶ 30.]
[123] [Ct. Rec. 70 at ¶¶ 14 & 15 & Ex. J pp. 21-23 (Doc. 70-9) & Ex. K (Doc. 70-11).]

monthly service fee of $9.85 for the account, as set forth in the account agreement.[124]

Even if RMBT and GCS were subject to the debt adjuster fee limitation, which they are not, RMBT charged no fee and GCS charged a nominal fee. The statute expressly says that the "debt adjuster" cannot charge a fee in excess of 15 percent; the statute does not, as Carlsen and Popham ask this Court to read it, say that RMBT and GCS are liable for a predatory fee, which someone else allegedly received.

The Carlsen/Popham argument on this point begs another question: if RMBT and GCS are separately or collectively debt adjusters, would they not be entitled to charge a fee up to the maximum amount allowed by RCW § 18.28.080? Granted, the client will still be obliged to pay up to the maximum allowable fee to the company that ***actually*** negotiates and settles its debts, *i.e.* the real debt adjuster. But the statute, especially as Carlsen/Popham seemingly want it to be read, would allow each "debt adjuster," here RMBT/GCS ***and*** the "real" debt adjuster, to each collect their 15% fee, meaning, under the Carlsen/Popham construct each client is potentially responsible for up to 30% of their enrolled debt as fees legitimately charged and payable to the two debt adjusters Carlsen/Popham claim exist here.

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[124] [Ct. Rec. 70 at ¶¶ 9 & 11 Ex. F at pp. 23 & 25; Ct. Rec. 31 Ex. B (31-3).]

3. Carlsen and Popham ask the Court to read language into the fee limitation provision, and to ignore language that they claim is "not a necessary condition".

The fee limitation provision of the Debt Adjusting statute is found in RCW § 18.28.080, which states, in pertinent part:

> (1) By contract a debt adjuster may charge a reasonable fee for debt adjusting services. **The total fee for debt adjusting services may not exceed fifteen percent of the total debt listed by the debtor on the contract. The fee retained by the debt adjuster from any one payment made by or on behalf of the debtor may not exceed fifteen percent of the payment**. The debt adjuster may make an initial charge of up to twenty-five dollars which shall be considered part of the total fee.[125]

According to Carlsen and Popham the fee limitation provision says three things: (1) it does not matter if an entity is actually a "debt adjuster," the fee limitation provision only requires the entity to "collaborate" with a debt adjuster; (2) the fee limitation is not based on the fee the "debt adjuster" retains; and (3) to read the statute to limit the fee to what the "debt settlement company" receives promotes mischief. [126]

To support the first of these contentions, Carlsen and Popham argue the focus is on the "payment made" language, not on the "fee retained by the debt adjuster." They claim that a revision to the statute in 1979 means that the limitation applies "without restriction as to the party

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[125] RCW § 18.28.080; (Emphasis added.).
[126] [Carlsen Brief pp. 22-24.]

receiving the payment."[127] The statute, however, makes clear that the fee limitation applies to the fee "retained by the debt adjuster". Carlsen and Popham, however, ask this Court to replace the words "debt adjuster" with the word "collaborators."[128] The plain meaning of the statute cannot be stretched to accommodate the Carlsen and Popham contention.

To support the second contention, Carlsen and Popham argue "[t]he receipt of funds . . . is not a necessary condition for settlement activity to fall within the statutory definition of 'debt adjusting'," because being a "collaborat[or]" is enough to be deemed a debt adjuster.[129] Carlsen and Popham ask this Court to read the "retained" language literally out of the provision, as being "wholly immaterial" or to conclude that since a "debt adjuster" works for "compensation" the receipt of compensation makes a person a debt adjuster and therefore subject to the fee limitations.[130]

If we re-write the actual statutory provision to fit what Carlsen and Popham argue, the fee limitation provision would read:

> (1) By contract a debt adjuster may charge a reasonable fee for debt adjusting services. The total fee for debt adjusting services may not exceed fifteen percent of the total debt listed by the debtor on the contract. The fee retained by the debt adjuster from any one payment made by or on behalf

[127] [Carlsen Brief p. 23.]
[128] [Carlsen Brief p. 21-22.]
[129] [Carlsen Brief p. 22 (citing no legal authority; emphasis added).]
[130] [Carlsen Brief p. 21-22.]

> of the debtor [***without regard to the party actually receiving the payment. . . .***][131]

The statute speaks in terms of a fee being "charged" and thereafter retained by the debt adjuster (using the word "retain" or an iteration thereof a total of three times). It is clear that neither RMBT nor GCS charge or retain any debt adjusting fee. Absent this essential predicate conduct by either RMBT or GCS, this statute has no application here. Where a statute is plain on its face, a court should not engage in judicial construction by adding language to the statute.[132] Carlsen/Popham cannot turn RMBT and GCS into debt adjusters by claiming someone else supposedly collected a predatory fee.

Finally, to support their third contention, the Carlsens and Pophams ask this Court to interpret the provision keeping in mind the "mischief sought to be met."[133] On this premise, they repeat their contention that it is "immaterial" whether RMBT or GCS actually received an excessive payment. Even though the Carlsens and Pophams directed the debt settlement company's fee to be paid from their account, they say RMBT and GCS – whether as debt adjusters or collaborators, and irrespective of whether they actually received any money - are responsible

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[131] [Carlsen Brief p. 23 (emphasis supplied to the Carlsen and Popham words).]
[132] *See, e.g., Cananwill, Inc.*, 80 P.3d at 598.
[133] [Carlsen Brief. p. 23.]

for the predatory fee.[134] Again, Carlsen and Popham want to skip over the facts, they want to pin a label of "debt adjuster" on the bank and the bank's processing agent, and they want this Court to conclude that the statute and fee limitation apply regardless of whether RMBT or GCS are debt adjusters or ever charged or retained a debt adjuster fee.

D. QUESTION 4: WHEN THE LEGISLATURE HAS PROVIDED AN ADEQUATE CIVIL REMEDY IN A STATUTE, NO CAUSE OF ACTION CAN BE IMPLIED.

Carlsen and Popham spend eight (8) pages of their 32-page brief discussing "aiding and abetting." Overall, the meandering discussion of the law of various states does nothing to address Certified Question 4; instead, in a single paragraph at the end of the eight-page discussion, Carlsen and Popham state a false premise and then a circular conclusion to answer the Question. Although in their original Complaint they alleged RCW § 18.28.190 as the statutory and only basis for aiding and abetting liability (they asserted no common law cause of action), they now say that aiding and abetting is a purely common law theory, repudiating their prior reliance upon RCW § 18.28.190 as "the birthplace of civil liability for [their] aiding and abetting [theory]."[135] The Court's certified question did not account for the Carlsen/Popham's abandonment of the statutory basis for aid and abets liability they formerly embraced. Although

[134] [Carlsen Brief. p. 23.]
[135] [Carlsen Brief p. 32.]

Carlsen/Popham have now posited the question this way, whether Washington has endorsed a ***common law*** theory of aid and abets liability is not before this Court nor a proper issue to be addressed in the parties' briefing.

What Carlsen and Popham argue is that the criminal provision in the Debt Adjusting statute does not preclude liability under a "common law" aiding and abetting theory, but Carlsen and Popham do not explain why, they just say it. Carlsen/Popham likewise do not explain why their point is even relevant, as it is certainly not within the ambit of the fourth Certified Question the District Court has posited.

As to Certified Question 4 as the District Court crafted it, there is no aiding and abetting remedy under the Debt Adjusting statute for at least two separate and independent reasons: (1) the Legislature stated its intent expressly that aiding and abetting under the Debt Adjusting statute only gives rise to a criminal violation, and (2) the Legislature provided an adequate remedy in the statute. Consequently, the Carlsen/Popham argument on Certified Question 4 fails and the Question – the only question the District Court actually asked - must be answered **No.**

A cause of action will only be implied under a statute if: (1) the plaintiff is within the class for whose especial benefit the statute was enacted; (2) the legislative intent, explicitly or implicitly, supports creating

or denying a remedy; and (3) implying a remedy is consistent with the underlying purpose of the legislation.[136] Furthermore, no cause of action should be implied when the Legislature has provided an adequate remedy in the statute.[137] Carlsen and Popham did not, and cannot, show any of these elements. One is most illustrative: the Legislature explicitly denied a civil aid and abets remedy.

While the Legislature made it a crime to violate, or to aid and abet, a violation of the Debt Adjuster statute,[138] it also provided a very specific civil remedy for a direct violation ***only***. The civil remedy under the Debt Adjuster statute is through the Unfair Business Practices statute. Specifically, the Debt Adjusting law, RCW § 18.28.185 states that:

> A violation of this chapter constitutes an unfair or deceptive act or practice in the conduct of trade or commerce under chapter 19.86 RCW.

Washington's Unfair Business Practices Act RCW 19.86.020, declares unfair or deceptive acts or practices in the conduct of any trade or commerce unlawful. RCW 19.86.020 also declares a direct violation of the Debt Adjuster act to be unlawful since a violation of the Debt Adjuster act could be a deceptive and unfair trade practice. Thus, RCW

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[136] *Wingert v. Yellow Freight Sys.*, 146 Wn.2d 841, 850, 50 P.3d 256, 261 (2002).
[137] *Cazzanigi v. General Elec. Credit Corp.*, 132 Wn.2d 433, 938 P.2d 819, 825 (1997) (citing *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990)).
[138] *Bradley v. Morgan Drexen, Inc.* 20009 WL 2870508 * 2, n.1 (E.D. Wash. Aug. 31, 2009).

19.86.140, which provides the civil remedy for a violation of RCW 19.86.020, also provides the civil remedy for a violation of RCW 18.28.185, the Debt Adjusting statute.

In contrast, the criminal penalty in RCW 18.28.190, upon which Carlsen and Popham initially predicated their claim for aider or abettor civil liability and from which they now have hastily retreated in order to try a common-law end-run around the statute, makes clear that:

> **Any person who** violates any provision of this chapter or **aids or abets such violation**, or any rule lawfully adopted under this chapter or any order made under this chapter, **is guilty of a misdemeanor**.[139]

Aider and abettor liability is plainly distinguished from liability for a direct violation of the statute, for which the Legislature has deemed a distinct civil remedy appropriate. Thus, no civil remedy for aiding and abetting can be derived from this statute. RCW 18.28.200, which is consistent with and enables RCW 18.28.190, provides that:

> Notwithstanding any other actions which may be brought under the laws of this state, the attorney general or the prosecuting attorney of any county within the state may bring an action in the name of the state against any person to restrain and prevent any violation of this chapter.

While it is true the Legislature may provide for both civil remedies and criminal penalties in the same act without thereby converting the civil

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[139] (Emphasis added.)

proceeding into a criminal proceeding,[140] the dispositive issue is whether the statutory provision imposes a criminal sanction. The question of whether a statutory provision imposes a criminal sanction or civil remedy is one of statutory construction.[141]

Overlooking that RMBT and GCS are exempt from the Act for a moment, "it is a crime to violate the Washington Debt Adjustment Act . . . RCW 18.28.190."[142] That leaves enforcement of that particular provision to the State, as this statute is not susceptible to any interpretation that affords a private, non-state actor a civil aid or abet remedy.

As the foregoing demonstrates, the expressed legislative intent, eliminates any argument the Legislature supported creating a civil aiding and abetting remedy within the Debt Adjuster statutory scheme. Consequently, RMBT and GCS cannot be held liable under RCW 18.28.190 as one who "aids or abets such violation" since there is no implied right of civil action because the plain language of the statute makes clear that the offense constitutes a crime,[143] and not a civil wrong

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[140] *Beckett v. Department of Soc. & Health Servs.*, 550 P.2d 529 (1976), *overruled on other grounds Dunner v. McLaughlin*, 676 P.2d 444 (1984).
[141] *Id.*
[142] *Bradley*, 20009 WL 2870508 * 2, n.1 (E.D. Wash. Aug. 31, 2009)
[143] *See* RCW 9A.04.040 "Classes of crimes. . . . (1) An offense defined by this title or by any other statute of this state, for which a sentence of imprisonment is authorized, constitutes a crime. . . . (2) . . . A crime is a misdemeanor if it is so designated in this title or by any other statute of this state. . . . " The elements for complicity or aiding and abetting are found in RCW 9A.08.020(3). *See also In re Forfeiture of One 1970 Chevrolet Chevelle*, 2009 WL 2783439, * 4 (Wash. Sep. 03, 2009) (NO. 81116-4) (aiding

for which there is a civil remedy. So, only the state can bring an action against a corporation for an aids or abets violation.[144]

Furthermore, even if there were no adequate civil remedy under the Debt Adjusting statute through the Unfair Business Practices Act, neither RMBT nor GCS can be held secondarily liable for the alleged acts of others or the acts of non-parties under a common law theory. The civil remedy borrowed from RCW 19.86.020 is the ***exclusive*** remedy afforded for any civil action arising from the Debt Adjuster statute, including one for "aid and abet" liability. But it is clear that the scope of RCW 19.86.020 is narrow. Indeed, RCW 19.86.020's scope has been generally constrained to those who directly commit the unfair or deceptive act: in the instant case, the debt settlement company that allegedly receives and retains the allegedly excessive fee, not to secondary actors.

For example, the U.S. Supreme Court in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*,[145] a case determining the scope of liability

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and abetting requires proof of someone actually doing something to support or facilitate the commission of a crime or actually knowing and assisting in the criminal activity in order to be subject to criminal sanctions); *State v. Robinson*, 872 P.2d 43 (Wash. 1994).

[144] RCW 9A.08.030 provides for punitive actions based on "Corporate and personal liability" stating that ". . . (5) Every corporation, whether foreign or domestic, which shall violate any provision of RCW § 9A.28.040 [criminal conspiracy misdemeanor], shall forfeit every right and franchise to do business in this state. The attorney general shall begin and conduct **all actions** and proceedings necessary to enforce the provisions of this subsection." (Emphasis added).

[145] 552 U.S. 148 (2008). Likewise, in *Cort v. Ash*, 422 U.S. 66, 78 (1975), the issue was whether a civil cause of action existed under a criminal statute prohibiting corporations

of secondary actors, held that "aiders and abettors" of fraud cannot be held secondarily liable under the private right of action authorized by § 10(b) of the Exchange Act. Such defendants can only be held liable if their own conduct satisfies each of the elements for § 10(b) liability. The Court ruled that fraud claims are not allowed against third parties who did not directly mislead investors, but who were business partners with those who did. Likewise, RCW 19.86.020 has not allowed the use of an alter ego theory to create secondary liability in order to lasso in corporate officers.[146]

Here Plaintiffs seek to impose secondary actor liability on RMBT and GCS based on an allegation that they as ***collaborators*** facilitated the voluntary payment ***by Plaintiffs*** of an illegal statutory fee in connection with Plaintiff's respective debt settlement program, a fee that Carlsen and Popham paid someone else under a debt settlement agreement to which neither RMBT nor GCS was a party. All RMBT and GCS did was provide traditional ACH clearing services for an account that the Carlsens and Pophams established, an account which they owned and exclusively controlled and were free to terminate at any time.

GCS – no different than another other bank - simply effectuated the Carlsens' and Pophams' directions about the funds in their account.

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from making contributions to a presidential campaign. The Court said that no such action should be implied.

[146] *Grayson v. Nordic Construction Co., Inc.*, 599 P.2d 1271 (Wash. 1979)

The alleged wrongdoer – the debt settlement company – receives the fee payment and it, not RMBT or GCS, is the direct violator (allegedly) of the Debt Adjuster Act. Indeed, Carlsen and Popham concede as much by predicating RMBT's and GCS's liability initially upon an "aid and abet" theory, but not upon a direct violation of the law.

This Court should reject the Carlsen/Popham belated attempt to circumvent the legislative derived remedial constraints of the Debt Adjusting statute through a common law aiding and abetting cause of action in order to establish secondary liability.[147] And directly answering the District Court's Certified Question 4, something Carlsen and Popham avoid, the aid and abet language in the Debt Adjusting statute is not a basis for civil liability here, since the provision makes such activity a crime and creates no civil aiding and abetting remedy; the statute has no implied right of such a civil action because it provides a civil remedy for any direction violations.

V. CONCLUSION

RMBT and GCS are not debt adjusters. They are a bank and a bank's agent both of whom are doing business related to banks. They do not charge or retain any fees for debt adjusting (as they do none) and

[147] If common law aiding and abetting can be used as a super trump card, no statutory exemption in any statute is safe because a plaintiff could always, as Carlsen and Popham argue, use the common law to supplant and circumvent the Legislature's express statutory pronouncements.

certainly do not charge or retain any fees for banking services exceeding the statutory threshold. Finally, RMBT and GCS cannot be civilly liable for aiding and abetting, as Washington's criminal statute does not afford an implied civil right of action. The District Court four Certified Questions should be answered:

Question No. 1	***NO***
Question No. 2	***YES***
Question No. 3	***NO***
Question No. 4	***NO***

DATED this 28th day of September, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2010, I filed the foregoing with the Clerk of the Court by depositing a copy in the U.S. Mail, postage pre-paid and also provideddcopies of the foregoing documents to the following parties via email and U.S. Mail, postage prepaid, addressed as follows:

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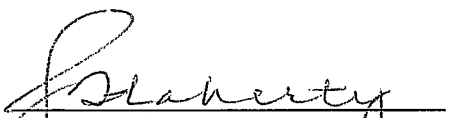

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